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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554


Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, CS Docket No. 97-248; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, RM 9097

Dear Ms. Salas:

Enclosed for filing please find an original and eleven (11) copies of the Reply Comments of RCN Telecom Services, Inc. in the above referenced matter.

If you have any questions concerning this filing, please do not hesitate to contact the undersigned.

Respectfully submitted,


Jean L. Kiddoo
Kristine DeBry

Its Counsel

Enclosures

cc: Deborah Klein - Cable Services Bureau (w/diskette)
Steve Broeckaert - Cable Services Bureau
Chris Wright - Office of the General Counsel
Office of Commissioner Susan Ness
International Transcript Services (ITS)

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992)
)
Petition for Rulemaking of)
Ameritech New Media, Inc.)
Regarding Development of Competition)
and Diversity in Video Programming)
Distribution and Carriage)

CS Docket No. 97-248

RM No. 9097

**REPLY COMMENTS OF
RCN TELECOM SERVICES, INC.**

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February 23, 1998

TABLE OF CONTENTS

TABLE OF CONTENTS	i
SUMMARY	ii
I. INTRODUCTION	1
II. THE COMMISSION SHOULD EXPAND ITS PROGRAM ACCESS RULES TO PROGRAMMING MOVED FROM SATELLITE TO TERRESTRIAL DELIVERY ..	4
III. THE COMMISSION SHOULD ESTABLISH A SHORT DEADLINE FOR RESOLUTION OF PROGRAM ACCESS COMPLAINTS	9
IV. THE COMMISSION SHOULD ESTABLISH A RIGHT TO DISCOVERY FOR ALL PROGRAM ACCESS COMPLAINTS	10
V. THE COMMISSION SHOULD IMPOSE MEANINGFUL PENALTIES FOR VIOLATION OF THE PROGRAM ACCESS RULES	11
VI. CONCLUSION	12

SUMMARY

It is critical that the Commission make programming available to the maximum extent possible to foster competition in the video marketplace. To that end, the program access rules must be strengthened in order to provide the tools required by video providers who seek to compete with cable incumbents. Contrary to the views of cable operators who have told the Commission that the current rules are adequate, the rules provide little incentive for compliance and thus are not adequate. The long period of time required for the Commission to resolve a complaint, coupled with the likelihood that cable operators will not be punished for failure to comply, diminishes the impact the rules have on cable operators' anti-competitive behavior. The cable industry has argued that heightened penalties for program access violations and reduced time periods for the resolution of complaints are unnecessary. The absence of these safeguards, however, helps to cement the market position of incumbents by making it more profitable to delay or refuse to provide programming than to cooperate with competitors.

Further, discovery is not generally available to video providers who allege discrimination by cable operators. Competitive video providers thus often lack the evidence required to establish a program access violation. The cable industry has told the Commission that discovery is not necessary and will only prolong program access proceedings. To the contrary, discovery of information necessary to establish or dismiss a complaint will expedite program access proceedings and thus is in the best interest of all parties.

Finally, video competition is threatened where vertically-integrated cable operators can evade the rules by using terrestrial rather than satellite delivery. The cable industry has argued that satellite programming moved to terrestrial delivery is outside the scope of the program access rules and that the Commission has no authority to apply the rules to this programming. However, programming moved from satellite to terrestrial delivery should remain "satellite programming" for purposes of the rules, and both Congress and the Commission have recognized the Commission's authority to regulate behavior, such as the switching of distribution technologies, that impedes the development of video competition.

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Distribution and Carriage)	

**REPLY COMMENTS OF
RCN TELECOM SERVICES, INC.**

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, respectfully submits the following reply comments in the above-captioned proceeding.

I. INTRODUCTION

RCN, through its subsidiaries, is a facilities-based provider of local and long-distance telephone, video and Internet access to residential markets in Boston, New York, Pennsylvania, and in the near future, the Washington, D.C. metropolitan area. RCN seeks to bring its service to market as rapidly as possible. To that end, RCN depends heavily on the Communications Act¹ and the program access rules² without which it could not gain access to the video programming necessary to attract subscribers. While the program access rules have been helpful to RCN's efforts to gain programming, current applications of the rules do not provide adequate incentives for cable operators to cooperate with new market entrants. Considering that the current rules provide no time limit for the Commission's resolution of program access complaints, no real

¹ § 628 of the Communications Act of 1934, as amended; 47 U.S.C. § 548.

² 47 C.F.R. §§ 76.1000-1004.

threat of discovery, and insufficient economic penalties for failure to comply, it is not surprising that the cable industry commenters spoke with a unified voice in this proceeding. They told the Commission that the rules are adequate and need not be modified.³ Further, they told the Commission that the small number of complaints brought and the smaller number of complaints resolved is an indication that the system is working.⁴ This analysis fails to bring to light the reasons more complaints are not brought. Competitors are primarily concerned with reaching the market quickly. They may be willing to settle for unfair programming deals which allow them immediate access to programming. Filing a complaint with the Commission ensures that access to the contested programming will be delayed indefinitely while the Commission considers the complaint. Further, even if the complaint is successful, the competitor is only granted access to the programming and the wrongdoer is not punished.

Contrary to the views of the cable industry, the absence of formal complaints does not represent the realization of Congress's intent that controversies be settled privately. Quite simply, competitors who are treated unfairly do not bring complaints because they have nothing to gain by doing so. The cable industry may take advantage of this situation to extract unfair concessions from competitors and thus entrench its own market position. The Commission can and should level the playing field by modifying the rules to create incentives for cable operators to cooperate with competitors.

Further, the Commission should close the loophole that allows cable operators to evade the rules by moving programming from satellite to terrestrial delivery. If the program access rules are strengthened, but this loophole is not closed, cable operators will seek to escape the tougher rules by moving increasing amounts of programming to terrestrial delivery.

Modification of the program access rules with regard to the actions of vertically-

³ See Comments of Time Warner Cable ("Time Warner"), in FCC CS Docket No. 97-248, at 2 (filed Feb. 2, 1998); Comments of National Cable Television Association ("NCTA"), at 2; Comments of Cablevision Systems Corporation ("Cablevision"), at 5; Comments of Encore Media Group ("Encore"), at 3; Comments of Comcast Corporation ("Comcast"), at 1-2; Comments of Liberty Media Corporation ("Liberty Media"), at 1-2. See also Comments of Home Box Office ("HBO") (opposing modification of the Commission's program access rules regarding only discovery and damages).

⁴ See Comments of Liberty Media, at 3; Comments of Time Warner, at 2; Comments of NCTA, at 4-5.

integrated cable operators is an important step toward creating marketplace conditions that favor competition. Even if these improvements are made, however, video competitors will continue to face formidable obstacles as they attempt to bring their services to market. For example, competitors often cannot access programming that is the subject of an exclusive agreement between a cable operator and an independent programmer. Exclusive agreements between powerful cable operators and independent programmers have the dangerous effect of denying vital programming to small video competitors. These arrangements appear to be less the result of unfair behavior by independent programmers, and more the result of coercion by powerful cable operators who refuse to carry programming without a guarantee of exclusivity. The financial viability of an independent programmer could be destroyed by choosing to serve all comers, rather than entering into an exclusive arrangement with a large cable operator. Where a cable operator engages in an anti-competitive practice, such as requiring a programmer to withhold programming from competitors, and thus prevents new competitors from gaining access to or providing programming to customers, the Commission should take action.

Without effective, immediate access to programming, it is impossible for video providers to compete based on price and service. Competitors, such as RCN, can establish a foothold in new markets only by debuting with a programming lineup that rivals the incumbent's lineup. Without a full slate of popular programming at the outset, it is impossible to attract a large number of subscribers. Lacking a sufficient subscriber base, new services will fail to gain the revenue necessary to expand. Without expanding and becoming more robust market participants, competitors will cede the field to incumbents and competition will cease. This fatal chain of events is triggered by the inability of a competitor to acquire a full slate of programming immediately upon entering the market. Thus, access to the same programming incumbents offer is a prerequisite to competition.

Finally, competitors are threatened by the fact that some independent programmers have sought to treat non-cable distributors, such as OVS, less favorably than cable systems. For example, some core programming suppliers have been reluctant to offer RCN's OVS the same rates and discounts as those offered to cable systems. The Commission should work to ensure that, with regard to purchasing programming for their subscribers, all video providers are treated

fairly *vis-a-vis* cable operators. New competitors simply cannot thrive where exclusive arrangements and discriminatory treatment make it impossible to offer the same programming offered by incumbents.

II. THE COMMISSION SHOULD EXPAND ITS PROGRAM ACCESS RULES TO PROGRAMMING MOVED FROM SATELLITE TO TERRESTRIAL DELIVERY

At the outset, RCN notes the nearly unanimous view of video competitors who commented on “terrestrial evasion” that, if left unchecked, cable operators’ avoidance of the program access rules through movement of programming from satellite to terrestrial distribution will mushroom into an industry-wide threat to competition.⁵ RCN also notes the uniformity of cable operators’ comments against this position. Cable operators naturally wish to protect their market dominance by exercising control over the maximum amount of programming possible. Thus, they have resisted applying the program access rules to satellite programming that is exempted from the rules once it has been transferred from satellite to terrestrial delivery.⁶

The cable industry has told the Commission that application of the program access rules to programming moved from satellite to terrestrial delivery is not necessary because there is no evidence that this activity constitutes a problem.⁷ Evasion of the rules is, however, an enormous problem for competitors. Without access to the programming that consumers demand, especially sports programming, competitors simply cannot build a customer base. The Commission should not take lightly the evidence brought to light by RCN, DirecTV and BellSouth that Comcast is

⁵See Comments of RCN Telecom Services, Inc., in FCC CS Docket No. 97-248, at 12-14 (filed Feb. 2, 1998) (“Comments of RCN”); Comments of The Wireless Cable Association International, Inc. (“WCA”), at 20-22; Comments of DirecTV, Inc., at 12; Comments of Consumers Union, at 8; Comments of BellSouth Corporation, at 19-22. See also Comments of EchoStar, at 12; Comments of Ameritech New Media, Inc., at 26; Comments of Bell Atlantic, at 9-10; Comments of GE American Communications, Inc. (“GE Americom”), at 5.

⁶See Comments of Cablevision, at 13-24; Comments of NCTA, at 13-17; Comments of Comcast, at 8-16; Comments of Time Warner, at 7-8; *But See* Comments of Liberty Media Corporation, at 24-25 (arguing only that the Commission has no authority over “services that have always been distributed via non-satellite means” (emphasis in original) thus leaving open the possibility that the Commission has authority to address satellite programming moved to terrestrial delivery in order to evade the rules).

⁷ See Comments of Time Warner at 8; Comments of Comcast at 13-15.

avoiding the program access rules by delivering its regional sports network via terrestrial facilities.⁸ RCN agrees with DirecTV that this action, if unchallenged, will result in additional cable operators changing delivery methods to avoid the rules.⁹ RCN shares WCA's concern that Cablevision is moving to circumvent the program access rules by switching delivery methods and that Cablevision's strategy to commit its resources to developing a new programming venture for exclusive terrestrial delivery will threaten competition by MVPDs.¹⁰ This strategy is particularly alarming in light of Cablevision Chairman Charles Dolan's reported intention that "he would like to restrict distribution of SportsChannel groups of services . . . to cable systems only."¹¹ Finally, RCN shares WCA's view that as vertically-integrated cable operators expand their sports networks, they will create unmatched programming offerings and render competition futile.¹²

If the loud voices of the cable industry are effective in arguing that insufficient evidence exists at this time to warrant applying the program access rules to programming moved from satellite to terrestrial delivery, a problem of even larger magnitude will manifest itself in the coming months and years. Once cable operators are given the green light to transfer programming to terrestrial delivery and thus avoid the program access rules, they will utilize this strategy to protect increasing amounts of programming from their competitors. Eventually, when programming is moved *en masse* to terrestrial delivery, thus removing it from the ambit of the program access rules, the damage will be too great to reverse. If allowed to invest in new delivery systems with the assurance that their programming will be protected, cable operators eventually will argue that they relied on current interpretations of the rules to design their business strategies. The cable operators will have the force of inertia behind them and it will be

⁸ See Comments of RCN at 12-14; Comments of DirecTV at 10-13; Comments of BellSouth at 20-21.

⁹ See Comments of DirecTV at 12.

¹⁰ See Comments of WCA at 20.

¹¹ See Comments of WCA at 20 (citing Satellite Business News at 3, Oct. 8, 1997). See also Comments of BellSouth at 20.

¹² See Comments of WCA at 21.

nearly impossible to modify the rules in a last minute effort to safeguard competition.¹³

The Commission must act now to ensure the continuing viability of the program access rules as a mechanism to ensure that competitors have access to vital programming. RCN agrees with competitive commenters¹⁴ that, contrary to the views of the cable industry,¹⁵ the Commission is empowered by Section 628(b) of the Communications Act¹⁶ to apply the program access rules where cable operators transfer programming from satellite to terrestrial delivery with the effect of denying it to competitors. The Commission further can draw authority from its own finding that it is empowered to use Section 628(b) to circumscribe any conduct that emerges as a barrier to competition.¹⁷

The cable industry argues that Congress did not intend to apply the program access rules to programming delivered by methods other than satellite, speculating that Congress “must have discerned a downside to applying the program access requirements” broadly.¹⁸ Despite NCTA’s speculation about the meaning of what Congress did not write in the program access legislative

¹³ See also *NBC v. U.S.*, 319 U.S. 190, 225 (1943) (Commission must use statutory powers to change regulations which time and changing circumstances reveal no longer serve the public interest).

¹⁴ See Comments of DirecTV at 13-18, Comments of Ameritech at 24-26, Comments of EchoStar at 23-26, Comments of WCA at 22-24.

¹⁵ See Comments of NCTA at 15, Comments of Cablevision at 16, Comments of Comcast at 8-10.

¹⁶ 47 U.S.C. § 548(b). Section 628(b) prohibits a cable operator from engaging in “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers.”

¹⁷ See *Implementation of §§ 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3374 ¶ 41 (“Program Access Order”). “Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming.” *Id.*

RCN agrees with competitive commenters that in addition to its authority to expand the program access rules under Section 628(b), the Commission also has broad authority under Section 4(i) of the Communications Act to address evasion of its rules. See Comments of GE Americom at 8-9, Comments of SNET Personal Vision, Inc., in CS Docket No. 97-248, at 5 (filed Feb. 2, 1998) (“Comments of SNET”), and Comments of Consumers Union at 4-5.

¹⁸ See Comments of NCTA at 14.

history, there is no textual evidence to support its explanation as to why the rules cover only satellite delivered programming. RCN agrees with GE Americom and Ameritech that the more likely explanation for the reference to satellite delivery is that virtually all programming was delivered by satellite at the time the law was enacted.¹⁹

In a further effort to remove programming transferred from satellite to terrestrial delivery from the ambit of the program access rules, the cable industry takes an overly narrow view of the scope of the term “satellite cable programming.” Comcast, for example, argues that because Congress used the term “satellite cable programming” a number of times in the statute, the statute applies to satellite programming. What Comcast fails to address is what it means for a program to be a “satellite program.” Congress intended to provide MVPDs with access to certain programming. That programming happened to be available via satellite. But the point of the program access law was to protect the interests of the viewing public by protecting the programming from anti-competitive arrangements. Thus, the focus of the program access law is on the highly sought-after programming, not the method of distribution, which is totally irrelevant to the viewing public.

RCN agrees with DirecTV that the term “satellite cable programming” should be construed to encompass programming that was once “satellite cable programming” and would have remained “satellite cable programming” but for the transfer of the programming to terrestrial delivery to avoid the program access rules.²⁰ Again, Congress’s intention when writing the program access law clearly was to target certain programming for non-discriminatory access, not to target certain transmission forms. Once deemed satellite programming, that programming cannot magically be converted into non-satellite programming by changing the way it is transmitted. In any event, the Commission, as the expert agency, is free to interpret its organic statute and such interpretation is entitled to judicial deference.²¹

¹⁹ See Comments of Ameritech at 24, Comments of GE Americom at 8.

²⁰ See Comments of DirecTV at 19.

²¹ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (if a statute is silent or ambiguous, the agency’s resolution need only be based on a “permissible construction of the statute”).

Finally, the cable industry seeks to convince the Commission that applying the program access rules to programming transferred from satellite to terrestrial delivery would be bad policy.²² The industry argues that exclusivity is an important incentive to the creation of new programming. Cablevision states that with no hope of making exclusive arrangements, new local and regional programming “will not be developed.”²³ This is simply not the case.

Contrary to the industry’s arguments, exclusivity is not the catalyst that drives the creation of new programming. History shows that even after the program access law was passed in 1992, thus barring exclusive deals, an abundance of programming was created. The fact that programming could not be offered on an exclusive basis did not deter MSOs from launching 38 new offerings between 1992 and today.²⁴ Further, MSOs plan to launch five new offerings in the near future.²⁵

Even accounting for the unique contours of regional programming, incentives to create new programming still exist in the form of increased advertising revenue and fees charged to MVPDs for sale of the programming. Contrary to Cablevision’s assertion that it will be difficult to convince distributors to carry regional programming without a promise of exclusivity, distributors will continue to have a strong desire to carry regional programming, especially sports, because consumers demand it. The only incentive that would be eliminated if cable operators were required to share terrestrially-delivered programming is the incentive to corner the market and drive out competitors. This is not an incentive the Commission should protect.

²² See Comments of Comcast at 11-13; Comments of Cablevision at 17-24.

²³ See Comments of Cablevision at 18 .

²⁴ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC CS Docket No. 97-141 (Jan. 13, 1998) (“1997 Competition Report”), Table F-1 (MSO Ownership in National Programming Services).

²⁵ See *Id.* at Table F-3 (Planned National Programming Services Affiliated with a Cable Operator).

III. THE COMMISSION SHOULD ESTABLISH A SHORT DEADLINE FOR RESOLUTION OF PROGRAM ACCESS COMPLAINTS

RCN agrees with Ameritech, SNET, DirecTV, National Rural Telecommunications Cooperative, Consumer Satellite Systems and Bell Atlantic that the Commission should amend its rules to provide a short deadline for issuance of decisions on Section 628 complaints.²⁶ RCN disagrees with NCTA's assertion that "time limits could prevent the Commission from giving adequate consideration to the facts and issues in particular cases."²⁷ On the contrary, the time periods suggested by Ameritech are sufficient for full exposition and consideration of the issues presented in a typical program access complaint. RCN further takes issue with NCTA's assertion that abbreviated time limits would increase the likelihood of an erroneous decision. The Commission is capable of rendering a well-researched and well-reasoned decision within 90 days of the filing of the complaint where there is no discovery, and within 150 days of the filing of the complaint where the complainant has elected discovery. Indeed, as NCTA itself points out, the Commission sometimes renders decisions in similar time periods.²⁸ RCN assumes that these decisions are as sound as the ones rendered after a delay.

While the Commission is capable of rendering decisions within abbreviated time periods, the present uncertainty surrounding whether the Commission will quickly resolve a complaint deters cable operators from providing programming on favorable terms and from resolving conflicts privately. RCN agrees with Ameritech that delay weakens the bargaining position of competitors, especially where the contested issue is price. It may be in the financial interest of a competitor to pay a discriminatory high price for programming rather than lose the chance to attract new subscribers during the time period necessary to resolve the complaint through the Commission. This is particularly true in cases where programming is so vital to consumers that

²⁶ See Comments of Ameritech at 8-12; Comments of SNET at 2-3; Comments of DirecTV at 24-25; Comments of Bell Atlantic at 3-4; Comments of the National Rural Telecommunications Cooperative, at 12-14; Comments of Consumer Satellite Systems, Inc., at 6-9.

²⁷ See Comments of NCTA at 5-6.

²⁸ See Comments of NCTA at 6 (citing Letter to Hon. W.J. Tauzin from Chairman Kennard, Jan. 23, 1998, p.9).

they refuse to sign up with a service unable to offer it. A shortened time period would force cable monopolists to bargain in good faith or face immediate consequences and would spur competition by speeding programming to competitors and their subscribers.

IV. THE COMMISSION SHOULD ESTABLISH A RIGHT TO DISCOVERY FOR ALL PROGRAM ACCESS COMPLAINTS

RCN agrees with Ameritech, SNET, DirecTV, Consumer Satellite Systems and Bell Atlantic²⁹ that the Commission should amend its rules to allow the right to discovery in all Section 628 program access complaint proceedings. RCN reiterates its view that discovery is an important tool that the Commission should use to foster competition in the video marketplace. Access to information is critical to establishing a successful program access case. Discovery as of right is consistent with Congressional intent and the goal of expeditiously disposing of program access complaints.³⁰ Discovery would discourage discriminatory acts in the first instance by creating an awareness by cable operators that their discriminatory behavior would be revealed. If a complaint could not be resolved privately and therefore required formal resolution, the Commission would possess the factual information necessary to determine quickly the merits of the case.

Moreover, RCN disagrees with Cablevision's contention that "deep pocket" telephone companies would use discovery as of right to wring unwarranted concessions from programmers.³¹ The truth is that cable operators can currently use the absence of discovery to wring concessions from MVPDs, many of whom, like RCN, are small entrants who lack the bargaining power to gain fair treatment in the acquisition of programming. Under the current system, it is nearly impossible to gain access to the information necessary to establish whether an MVPD is being treated fairly *vis-a-vis* a programmer's affiliated cable operator. RCN and

²⁹ See Comments of Ameritech at 13-18; Comments of SNET at ; Comments of DirecTV at 25; Comments of Consumer Satellite Systems at 9-12; Comments of Bell Atlantic at 4-6; Comments of EchoStar at 3-7.

³⁰ Cf. Comments of NCTA at 7-9; Comments of Time Warner at 5; Comments of Comcast at 6.

³¹ See Comments of Cablevision at 26.

NCTA³² pointed out in their Comments that absent a rate card, unfair rate allegations by complainants are deemed true for purposes of establishing a program access complaint. However, it is very difficult to make accurate allegations without access to a threshold amount of information concerning the rates charged to affiliates. If programmers are charging the same rates to their affiliated cable operators as they charge to competitors, there is no reason to refuse to prove that in a contested proceeding. The Commission should provide a right to discovery for program access complainants to ensure that affiliated cable programmers will offer non-discriminatory rates to competitors or risk the discovery of their unfair -- and illegal -- acts.

V. THE COMMISSION SHOULD IMPOSE MEANINGFUL PENALTIES FOR VIOLATION OF THE PROGRAM ACCESS RULES

RCN agrees with WCA, Ameritech, SNET, DirecTV, Consumer Satellite Systems, Consumers Union, Bell Atlantic, BellSouth, and EchoStar that the Commission should impose meaningful economic penalties for violations of the program access rules.³³ Absent meaningful penalties, cable operators lack adequate incentive to comply with the rules. Currently, cable operators who refuse to comply can rest assured that even if a complaint is brought and resolved against them, they have not suffered a loss, but have achieved a gain -- the ability to offer programming to their subscribers during a time period when it was not available to competitors.

RCN reiterates its suggestion that penalties should be designed not to make the wrongdoer merely refund its ill-gotten gain, but rather to deter wrongful discrimination in the first instance. RCN recommends that the Commission adopt a system of stringent penalties, escalating during the period of time during which the cable operator refuses to provide programming in compliance with the rules. Further, these penalties should be tied to a defendant-specific indicator, such as a percentage of revenue, so that cable operators are deterred

³² See Comments of RCN at 6-7; Comments of NCTA at 9.

³³ See Comments of WCA at 15-19; Comments of Ameritech at 18-24; Comments of SNET at 4-5; Comments of DirecTV at 23; Comments of Consumers Union at 11-15; Comments of BellAtlantic at 6-9; Comments of BellSouth at 17-19; Comments of EchoStar at 7-9; Comments of Consumer Satellite Systems at 12-14.

by an amount proportional to their resources. At the very least, the Commission should increase the forfeiture amount in its guidelines to the maximum per day penalty of \$27,500.³⁴

RCN rejects Cablevision's argument that awarding damages would deter programmers from charging differential rates for legitimate economic and business reasons.³⁵ While Cablevision accurately states that certain circumstances permit programmers to engage in legitimate differential pricing,³⁶ there is no reason to believe that a programmer threatened with a program access complaint lacks the ability to substantiate its decision to price programming differently by supplying information showing the reason for the differential. Cablevision argues that if the required information were supplied, the Commission still may "simply disagree with its economic analysis and order a rate reduction."³⁷ RCN credits the Commission with the ability to adjudicate this type of dispute objectively, without placing fault by "simply disagreeing" with a programmer. RCN submits that the Commission is capable of distinguishing those complaints where legitimate price differentials are involved from those where MVPDs are offered unfair prices with no legitimate justification. Cablevision should not be hesitant to supply the information the Commission needs to distinguish one from the other.

VI. CONCLUSION

Competitive video providers are working furiously to enter new markets and thus provide wider choices, lower rates and better service to consumers. Competitors, however, cannot

³⁴ See 47 C.F.R. § 1.80(b)(4) Note, § I.--Base Amounts for Section 503 Forfeitures; *See also* Comments of Consumers Union at 11 (arguing that daily minimum and statutory maximum are too small to provide a deterrent to media conglomerates).

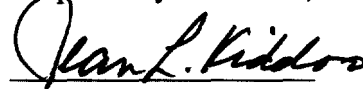
³⁵ See Comments of Cablevision at 27.

³⁶ See Comments of Cablevision at 27 (citing 47 U.S.C. § 548(c)(2)(B)(i)-(iii); 47 C.F.R. § 76.1002(b)(1)-(3)).

³⁷ See Comments of Cablevision at 28.

effectively enter new markets without adequate access to programming. The current program access rules do not provide adequate incentives for incumbent cable operators to cooperate with competitors and thus must be strengthened.

Respectfully submitted,

A handwritten signature in cursive script, reading "Jean L. Kiddoo".

Jean L. Kiddoo

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